Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:WAS:TL-N-7262-00
KEChandler

date: JAN 26 2001

to: Manager, Group 1341
Communications, Technology & Media

from: Associate Area Counsel (LMSB), Washington, D.C.

subject: [redacted]

This is in response to your December 4, 2000 request for advice regarding whether abatement of penalties for failure to file and failure to pay under I.R.C. § 6651 for [redacted] and [redacted] jeopardizes liabilities for such penalties in subsequent years. Your request also seeks advice concerning Appeals' position on this issue. Counsel cannot opine on whether Appeals would be willing to sustain penalties for [redacted], [redacted] and/or [redacted].

ISSUE

Whether abatement of penalties under I.R.C. § 6651 for failure to file and failure to pay jeopardizes liabilities for such penalties in subsequent years.

FACTS

On [redacted], the taxpayer filed with the District (i.e., IRS examination team case manager) delinquent federal income tax returns for the corporate entity [redacted] These five (5) late-filed returns were for the annual periods ending [redacted] through [redacted] In its original explanation for the delinquent filing of these returns, the taxpayer stated:

> Late in [redacted], [redacted]], which had been a member of the [redacted] affiliated group (EIN [redacted]),became separated from the group. The separation from the affiliated group occurred because the stock of [redacted] was transferred to a Swiss subsidiary. At year-end [redacted], [redacted] acquired [redacted] [[redacted] was the parent of [redacted]]. [redacted] had no U.S. operations or assets at all but had a U.K. branch. Following separation from the group, no U.S. tax returns were filed for [redacted]

although [redacted] continued to file U.K. returns. Apparently, [redacted] just fell through the cracks insofar as U.S. filings were concerned, probably because it had no U.S. operations or assets. Late in [redacted], in the course of [redacted]'s acquisition of [redacted], it was discovered by the newly created [redacted] tax department that [redacted] was not filing U.S. income tax returns.

On [redacted], the taxpayer provided a letter clarifying certain facts surrounding the delinquent returns and again requesting abatement of the delinquency penalties under I.R.C. § 6651 for each late-filed return. In attempting to demonstrate reasonable cause for failing to timely file and pay, the taxpayer stated:

> Despite our efforts, we have not found anyone who was aware that [redacted] had not complied with its U.S. filing obligations until our discovery in late [redacted]. Many returns were filed by [redacted] during [redacted], but we have not been able to discern why the [redacted] returns fell through the cracks. The best explanation we can provide is that an erroneous assumption was made that no returns were required because [redacted] had no U.S. operations or assets. Other possible explanations are that Exhibit 2.15 [of the [redacted] merger agreement which states [redacted]'s [redacted] return had not been filed] never found its way into the hands of someone who was in a position to act on filing the returns or, if it did, there was some confusion of responsibility between domestic and foreign tax personnel over who was actually preparing the returns and filing them. The important point, we believe, is that as soon as someone at [redacted] realized that the returns should have been filed but had not been, we immediately started the process of preparing the returns and coming forward.

In response to the taxpayer's request for abatement of the I.R.C. § 6651 penalties for all of the years [redacted] though [redacted], you determined:

> After careful consideration of all the facts presented, it is the district's view and its decision to give some credence to the taxpayer and honor the taxpayer's request for partial abatement of the delinquency penalty as there is some merit to its request but only for the periods ending [redacted] and [redacted]. In short, it seems fair and within the bounds of acceptability that this or any other taxpayer could have temporarily

failed to detect its requirement to file a return and pay tax as warranted for a newly acquired entity.

* * * * *

However, the taxpayer's request is without foundation and not favorably considered for the remaining periods, i.e., those ending [redacted], [redacted], and [redacted]. While the Service is willing to accept some element of "reasonableness" and partially excuse the taxpayer for its ineptness, the taxpayer has definitely and obviously failed to exercise ordinary business care and prudence in determining its filing requirements for the last three periods. It is important that the Service is consistent and fair with all taxpayers and no taxpayer can be allowed to go without disciplinary action or penalty when for such an extended period it has been deficient in complying with the Code.

DISCUSSION

There is no question that the taxpayer failed to timely file returns or pay its federal tax liabilities. Consequently, the only consideration is whether such failure is due to "reasonable cause and not due to willful neglect." You have concluded that "reasonable cause" exists as to the failures for [redacted] and [redacted] but not for subsequent years. You have not requested our opinion as to this conclusion, but a cursory reading does not suggest problems.

The narrow issue on which you have requested our opinion is whether abatement of I.R.C. § 6651 penalties for the years [redacted] and [redacted] jeopardizes assertion of those penalties for the years [redacted] through [redacted]. Whether sufficient reasonable cause for failure to file or pay tax liabilities must be evaluated as to each year, i.e., as to each delinquent return. As noted by the Tax Court in Pekar v. Commissioner, 113 T.C. 158 (1999) when considering the negligence penalty:

> Because the IRS has not pursued this issue in every prior year, petitioner contends that the penalty should not apply ...
>
> Petitioner's argument must fail because each taxable year stands on its own and must be separately considered. See United States v. Skelly Oil Co., 394 U.S. 678, 684 (1969). Respondent is not bound in any given year to allow the same treatment permitted in a previous year. See Lerch

v. Commissioner, 877 F.2d 624, 627 n.6 (7th Cir. 1986); Knights of Columbus Council No. 3660 v. United States, 783 F.2d 69 (7th Cir. 1986); Corrigan v. Commissioner, 155 F.2d 164 (6th Cir. 1946). ... "The mere fact that petitioner may have obtained a windfall in prior years does not entitle [him] ... to like treatment for the taxable year here in issue." Union Equity Coop. Exch. v. Commissioner, 58 T.C. 397, 408 (1972), aff'd 481 F.2d 812 (10th Cir. 1973); see also, Schaeffer v. Commissioner, T.C. Memo. 1994-227.

Further, the existence of reasonable cause excusing the taxpayer's delinquency is not created or enhanced by the Service's position as to other years. Your position concerning delinquent filings for earlier years was taken years after the returns for [redacted], [redacted] and [redacted] were due. As noted in Industrial Indemnity v. Snyder, 41 B.R. 882 (E.D.Wash. 1984), reasonable cause and the absence of willful neglect must be gauged at the time the return is due regardless of any subsequent changes in taxpayer's circumstances.

CONCLUSION

The abatement of penalties under I.R.C. §6651 for the years [redacted] and [redacted] does not preclude assertion, and ultimate imposition, of liability for such penalties for the years [redacted], [redacted], and [redacted]. The only consideration as to the later years is whether reasonable cause exists for failure to file and pay its tax liabilities.

If you have a question, please contact Special Litigation Assistant Karen E. Chandler. Her telephone number is (202) 634-5403, ext. 224.

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